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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1279

THE WILLIAMS & WILKINS COMPANY,

Petitioner,

against

THE UNITED STATES,

Respondent.

BRIEF OF THE MAGAZINE PUBLISHERS ASSOCIATION, INC., AS AMICUS CURIAE

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Interest of The Magazine Publishers Association, Inc.

The Magazine Publishers Association is a national trade association founded in 1919 and organized as a membership corporation under the laws of the State of New York. (For convenience of reference, The Magazine Publishers Association may sometimes hereinafter be called "M.P.A."). M.P.A. is presently composed of approximately 130 members who publish more than 420 magazines. Such magazines are distributed in almost all cases nationally throughout the United States, and are issued at various intervals, such

as each month or each week, although most are monthly publications. In the aggregate, these magazines have a circulation of approximately 200,000,000 copies per issue; it has been credibly estimated that their combined readership exceeds 89% of the literate adults in the United States.

The publications of M.P.A.'s members run the gamut of reader interest and concern—they possess a rich diversity—ranging from those of general circulation and appeal to those of limited circulation and special appeal.

The Magazine Publishers Association is reputed to be the largest organization of consumer magazines in this country.

In virtually all cases the magazines published by M.P.A.'s members are statutorily copyrighted. This is so because magazine publishing inescapably involves entrepreneurial risks, and one meaningful way to safeguard one's investment in such venture is for a publisher to acquire for each of his publications the exclusive rights status that valid copyright is designed to afford. Furthermore, M.P.A. has, among its standing, active and important committees, its Legal Affairs Committee, whose duties include advising M.P.A. on significant cases and developments in the law of copyrights.

M.P.A. has joined in amici briefs in this Court. It filed its own amicus brief in this case in support of petitioner's application for the writ of certiorari, which writ this Court recently granted.

The Magazine Publisher's Association reaffirms on this appeal its support of petitioner's position on the issue of copyright infringement.

M.P.A. files this brief (with the written consent of the parties) because, as will be more fully considered hereafter under Point I hereof, this case has, we submit, such transcendent meaning as to make it important to copyright proprietors in general and particularly to those who own copyrights in and to composite works, such as magazines.

Preliminary Statement

The case below, reported at 487 F. 2d 1345 (1973) was decided in respondent's favor by a closely divided United States Court of Claims. The petitioner claimed in that Court that its statutory copyrights to certain of its composite medical journals had been infringed by respondent's unauthorized, wholesale machine copying and distribution of *entire articles* published in those journals. Such copying and distribution were done by respondent through its National Institutes of Health (N.I.H.) and its National Library of Medicine (N.L.M.). For such alleged infringement, petitioner sought reasonable compensation from the Government under the applicable jurisdictional statute. Although petitioner had succeeded on the issue of liability before the Trial Judge, the Court of Claims itself, by a four-to-three vote, reversed and, as above indicated, held for the respondent on the theory that respondent's accused conduct constituted no more than fair use, *i.e.*, non-infringing use, of petitioner's copyrighted journals. The holding below exonerated the respondent despite its unauthorized,

extensive machine copying or photoduplicating of *complete, discrete copyrighted articles* and its subsequent widespread, albeit not-for-profit, distribution of such copies or photoduplicates to and among putative medical researchers and medical libraries.

Facts

The relevant facts, as found by the Trial Court and accepted largely by the Court below, are succinctly stated at page 673 of the Trial Court's opinion (172 USPQ 670). Such statement reads in material part as follows:

> "The N.I.H. library . . . subscribes to two copies of each of the journals in suit . . . Demand by N.I.H. research workers for access to plaintiff's journals . . . is usually not met by in-house subscription copies. Consequently, as an integral part of its operation, the library runs a photocopy service for the benefit of its research staff. On request, *a researcher can obtain a photocopy of an article from any of the journals . . .* Usually, researchers request photocopies of articles to assist them in their on-going projects; *sometimes photocopies are requested simply for background reading . . ., the library does not monitor the reason for requests or the use to which the photocopies are put. The photocopies are not returned. . . .*
>
> ". . ., N.L.M. cooperates with other libraries and like research- and-education-oriented institutions . . . in a so-called 'interlibrary loan' program. Upon request, N.L.M. will loan to such institutions, . . ., books and other materials . . . . In the case of journals, the 'loans' usually take the form of *photocopies of journal articles* which are supplied . . . free of charge and *on a no-return basis.* The term 'loan' therefore is a euphemism when journal articles are involved." (Italics ours.)

Summary of Argument

1. The decision below, especially its rationale,

   (a) has a significance reaching far beyond the conflicting interests of the parties to this litigation, and

   (b) raises erroneous doubts as to what constitutes a copyright infringement by "copying" insofar as periodicals, including magazines, are concerned, and

   (c) erroneously relies on the doctrine of "fair use" as a copyright infrigement defense.

2. The determination of the Court of Claims should be reversed and liability should be imposed on respondent for the infringement of petitioner's copyrights.

POINT I

The importance of this case extends beyond the interests of the parties.

While we think that the holding below is erroneous, the untenable rationale of such holding, as articulated by the majority below, is significantly more troublesome. It is, of course, the rationale which will not stay within the four corners of the particular case. To this effect it is well to note the dissent of Nichols, J. where at page 1387 he presciently observed:

> ". . . However, hedged, the decision will be read, that a copyright holder has no rights a library is bound to respect."

But even on its own factual footing, the instant case has important dimensions, as indicated by Chief Judge Cowen in his dissent below where he stated at page 1364:

> "... What we have before us is a case of wholesale, machine copying, and distribution of copyrighted material by defendant's libraries on a scale so vast that it dwarfs the output of many small publishing companies. In order to fill requests for copies of articles in medical and scientific journals, the NIH made 86,000 Xerox copies in 1970, constituting 930,000 pages. In 1968, the NLM distributed 120,000 copies of such journal articles, totalling about 1.2 million pages."

When broadly perceived, what really confronts us at bar is the conflict between two interests, one of an emergent nature and the other of established tenor, one interest which says I may use the modern technique of reprography so as to machine copy or photoduplicate, without let or hindrance, and whether or not the matter so reproduced is validly copyrighted, and the other, countervailing interest which says my valid copyrights are not to be so infringed.

We submit that in such conflict, reason and judicial authority are on the side of the copyrightee.

Copyrights, we urge, are not to be overwhelmed by improvements in the reproduction art, important to society as such improvements may be. It is doubtless true that sophisticated duplicating devices have made reproducing accurate, cheap, easy and quick, and dextrous as these devices may be, they are evaluatively stupid. Undoubtedly the availability of these devices, Xerox et al., has tended to make of so many of us nimble, though minor, nimmers, insofar as the copying of copyrighted material is

concerned. But such individual and private copying, in the confines of one's home or office, may perhaps be overlooked as de minimis. In any case, it is not that kind of copying that is involved at bar.

Furthermore, copyrights can and should stand on their own footing, especially those which are statutorily engendered. Such copyrights are socially desirable, as the Constitutional sanction of them demonstrates. Madison realized this when he said, writing as Publius, in Number 43 of the Federalist Papers, anent the Copyright Clause of the Constitution, that "The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged . . . to be a right of common law . . . *The public good fully coincides . . . with the claims of individuals*" (italics ours). This same appraisal of copyrights as making for societal good was stated by this Court in *Mazer* v. *Stein*, 347 U.S. 201, 219

Moreover, it should be borne in mind that when an author or proprietor creates or owns copyrightable matter he has the choice of retaining it in its unpublished state under a so-called common law copyright or of publishing it under the panoply of statutory copyright. And here, too, the public interest comes to the fore. When such author or proprietor so publishes he makes a bargain with the public: under such quid pro quo theory the common law right is exchanged for the statutory right, a purpose of the copyright statute being to induce the author or proprietor to "bring out" the work, *i.e.*, to make it accessible to the public. (See A.H. Wasserstrom, "The Copyrighting of Contributions to Composite Works", 31 Notre Dame Lawyer 381, 395—1956).

If the decision below is to go uncorrected, the value of copyrights to magazines may be sorely diminished, if not rendered worthless. If such massive machine copying as obtained at bar should go unabated, magazines in general, and technical journals in particular, may cease to exist. Such eventuality seems not fanciful or far-fetched, especially for such publications as are in a marginal profit category. If that should come about we might find government publications filling the vacuum or government subventions shoring up the still privately owned and operated publications. In either case, the public may well be the loser, we think, because government functionaries, rather than independent copyrightees, will determine what may or may not be published. (On this serious threat of censorship, see footnote 7 of the Trial Court's opinion below at 172 USPQ 670, 676, and the perceptive study "Project—New Technology and the Law of Copyright: Reprography and Computers", 15 UCLA Law Review 931, 956 *et seq.*).

Apart from the specter of censorship, the sheer diminution in the number of privately owned and operated magazines can only lead, we believe, to a loss in diversity and robust discussion, since "the magazine" [is] "the medium *par excellence* for diverse opinion and specialized audiences. * * * In the magazine field, competition remains an acute fact of life. The magazine has become the great outlet for the multitudinous energies and values of our society, the channel of communication for the particular interests in our infinitely varied national life, the means of expression for all those ideas and views that are the concern of Americans as individuals and special

groups rather than as a broad, undifferentiated mass . . ." (see page 9 of statement of the noted historian and teacher, Arthur M. Schlesinger, Jr., submitted to the Postal Rate Commission, Docket No. R74-1, May 16, 1974).

We submit that petitioner's rights herein should be vindicated, despite the advanced technology of duplicating. If there is to be any public-interest accommodation between the *right* of the copyrightee and the *demand* of the non-commercial, machine copiest, whether institutional or otherwise, such as library or school, such accommodation, we suggest, should be made by the Congress and not by the Courts. However, the Court below wrongly rejected this approach and with unseemly self-esteem legislated on its own in respondent's favor.

POINT II

The unauthorized copying of copyrighted periodicals constitutes infringement.

The Court below entertained what it called "solid doubt" that periodicals as such come within the protective reach of copyright, insofar as copying *per se* is concerned. While this may very well have been a "solid doubt" for the Court below it is, we submit, a gratuitous doubt. The plain and unmistakable wording of the Copyright Code (17 U.S.C.) quite clearly provides in Section 1 thereof that all copyrighted works, and, of course, periodicals and composites are among such works (17 U.S.C. Section 3), are entitled to exclusivity not only as to the printing, reprinting and publishing of such works but also as to the copying thereof. As the dissent below rightly observed there seems

to be no legitimate reason for harking back to inapplicable legislative history regarding prior copyright acts. At bar, the meaning of the words used in said Section 1 should be derived from ". . . the words themselves . . ." and ". . . their setting in a text . . ." (Frankfurter, "Some Reflections On The Reading Of Statutes" 15—1947) so that here a court may quite properly "hug the shores of the statute itself" in construing said Section 1 (*ibid.*).

The Holmesian approach to reading statutes should be applied because "there is no canon against using common sense in construing laws as saying what they obviously mean" (*Roschen* v. *Ward,* 279 U.S. 337, 339).

To argue, as the Court below did, that the word "copy" may not mean "copy" is, we believe, to make of it a humpty-dumpty word, and seemingly to border on pretentious nonsense.

That the aforementioned "solid doubt" can have a seriously adverse effect on all periodicals, quite apart from those particular ones involved at bar, seems manifest because, if such doubt is to hover over this genre of copyrighted material, publishers of copyrighted periodicals will not know with reasonable certainty how to predict their legal rights in this context, that is, whether the copying of their works will entitle them to the same measure of protection as the law accords to other copyrighted works.

In fine, we submit, there seems to be no sound ground for excluding copyrighted periodicals from the protection of Section 1 of the Copyright Code, or of even having doubts on this score.

POINT III

The Court below erred in concluding that petitioner's entire copyrighted articles could be copied with impunity under respondent's "fair use" defense.

The Court below dismissed "as an overbroad generalization, unsupported by the decisions" (1353) the statement that "the copying of an entire copyrighted work cannot ever be 'fair use'." Such dismissal, we submit, is simplistic, and, indeed, erroneous. However, one need not take a position in this case on the making of but one, complete, unauthorized copy of a copyrighted work. What the Court below did was to permit the extensive copying, *i.e.*, the making of many copies, of articles contained within petitioner's copyrighted works on the ground that such copying constituted only fair use of such works. In the instant case we have the machine copying of several articles in their respective entireties. Such was tantamount to the copying of disparate, copyrighted works because the appropriated articles within petitioner's copyrighted journals constituted, under Section 3 of the Copyright Code, component parts of such journals. The general copyright to each journal as a whole was, under said Section, spread to the copyrightable components thereof, as if those components had been specifically copyrighted (A. H. Wasserstrom, *op cit., supra,* p. 11 at 403 *et seq.*). In short, each of the separate articles comprising the petitioner's medical journals constituted a distinct copyrighted work, even without a specific notice of copyright imprinted thereon. When such articles were unauthorizedly photocopied, petitioner's copy-

rights thereto were, we submit, infringed, and the bounds of "fair use" were overpassed. (*Benny* v. *Loew's Incorporated,* 239 F.2d 532, 537; *Wihtol* v. *Crow,* 309 F.2d 777, 780, *et seq.; Rosemont Enterprises, Inc.* v. *Random House, Inc.,* 366 F.2d 303, 310; *Robert Stigwood Group Limited* v. *O'Reilly,* 346 F.Supp. 376, 384; NIMMER, *"On Copyright",* sec. 145, p. 652.)

POINT IV

The Court below erred in requiring proof of serious economic detriment to the copyrightee to negate "fair use."

The fair use doctrine is made up of a plurality of considerations or criteria, only one of which is the adverse economic impact of the use on the potential market for, or the value of, the copyrighted work. Put another way, the fair use defense should not be available if the challenged use injuriously affects the copyrightee's rights. (*Hill* v. *Whalen & Martell,* 220 Fed. 359.) At bar, the machine copies of the whole articles were the functional equivalents of the original articles and replaced them. Hence, the copies quite clearly prejudiced the sale of the originals, and the defense of fair use should not have been invoked (Nimmer, *op. cit., supra,* 12 at pp. 646, 655, *et seq.*).

Conclusion

The decision below should be reversed, and liability should be imposed upon the respondent for the infringement of the petitioner's copyrights.

Respectfully submitted,

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